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Public Prosecutor v Ong Shwu Guan

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO MT(3) 45–57 OF 2002

B GENGADHARAN NAIR JC

5 NOVEMBER 2004

Criminal Law — Penal Code — s 302 — No direct evidence — Circumstantial evidence

C *— Confessions by accused retracted — Accused has a history of mental illness — Whether dangerous to depend solely on accused's confession*

Evidence — Admissions — Confession to murder — Confessions by accused retracted —

D *Accused has a history of mental illness — Whether dangerous to depend solely on accused's confession — Whether accused last seen with child inferred that she committed murder*

The accused was charged with murder under s 302 of the Penal Code. The accused

E claimed trial to the charge of murdering her own 10 month old daughter. There was no direct evidence to connect the accused to the crime, however there was sufficient circumstantial evidence viz the admission made by the accused to her husband that she put the deceased into the water container and the confession made to the police. The husband of the accused had testified that the accused suffered from mental depression and had a history of mental illness. The accused retracted from her

F confession and said that she did not place the child in the water container but made up a story that she killed the child because of her suicidal tendencies and blamed herself for the killing so that the police could put her to death. The accused called her only witness, the psychiatrist, Dr Nor Hashim Ahmad (DW2) to give evidence regarding her mental condition at the time of the incident and thereafter.

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Held, acquitting and discharging the accused:

(1) In view of the evidence of the DW2 it was highly prejudicial and dangerous to

H depend solely on the confession made by the accused. The psychiatric said that it was normal for persons suffering from psychotic depression to create these stories so that the person can be hanged for the offence. Based on the above evidence and the medical report of the accused, a reasonable doubt had been created as to whether it was the accused who had killed the child or the death was accidental as claimed by the defence (see paras 38–39).

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(2) DW2 was satisfied that at that time of the incident the accused was suffering from psychotic depression bordering on unsoundness of mind which incapacitated the accused from knowing or recalling or understanding what had actually happened. It was in these circumstances that the confession was made. This court therefore holds that the confession (upon full scrutiny by this

court) was unreliable, prejudicial and concocted by the accused and to rely on such a confusion given by a person suffering from mental depression and delusion would be unfair and defeats the ends of justice (see para 41).

(3) The court does not discount the possibility that the child who could walk had crawled or walked to the water container and climbed the toilet bowl and had accidentally fallen into the water container as there was evidence that the child can walk and had climbed the toilet bowl before. The only evidence in the absence of the confession was that the accused was last seen with the child and this mere fact does not infer that the accused had committed murder (see paras 42, 44).

[Bahasa Malaysia summary

Tertuduh dipertuduhkan dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan. Tertuduh menuntut perbicaraan kepada tuduhan membunuh anak perempuannya sendiri yang berumur 10 bulan. Tiada bukti secara langsung yang mengaitkan tertuduh kepada kesalahan tersebut, akan tetapi terdapat cukup keterangan mengikut keadaan iaitu melalui pengakuan oleh tertuduh kepada suaminya bahawa beliau telah meletakkan mangsa kedalam baldi air dan pengakuan kepada pihak polis. Suami tertuduh, telah memberi keterangan bahawa tertuduh mengalami kemurungan mental dan mempunyai sejarah kesakitan mental. Tertuduh kini telah menarik balik pengakuannya dan menyatakan bahawa beliau tidak meletakkan anaknya di dalam baldi air tetapi telah mereka cerita bahawa beliau telah membunuh anaknya oleh kerana kehendaknya untuk membunuh diri dan menyalahkan dirinya sendiri atas pembunuhan tersebut supaya pihak polis dapat menghukumnya sampai mati. Tertuduh memanggil saksinya yang sulung, pakar psikiatri Dr Nor Hashim Ahmad (DW2), untuk memberi keterangan berhubungan dengan keadaan mentalnya pada masa kejadian tersebut dan selepas itu.

Diputuskan, membebas dan melepaskan tertuduh:

(1) Memandangkan keterangan yang diberikan oleh DW2 adalah teramat prejudis dan bahaya untuk bergantung ke atas pengakuan semata-mata yang diberikan oleh tertuduh. Pakar psikiatri menyatakan bahawa ia adalah biasa untuk seseorang yang mengalami kemurangan psikotik untuk mereka cerita-cerita sebegini supaya ia dapat digantung untuk jenayah tersebut. Berdasarkan keterangan di atas dan laporan perubatan tertuduh, satu keraguan munasabah telah terbentuk samada sebenarnya tertuduh membunuh anaknya ataupun kematian tersebut adalah secara kemalangan seperti yang dinyatakan oleh pihak pembelaan (lihat perenggan 38–39).

(2) DW2 berpuas hati pada masa kejadian tersebut tertuduh sedang mengalami kemurangan psikotik yang membatasi ketaksempurnaan akal yang menghalangnya daripada mengetahui atau mengingat kembali atau memahami apa yang terjadi sebenarnya. Dalam keadaan inilah pengakuan dibuat. Mahkamah dengan ini memutuskan bahawa pengakuan (setelah diteliti sepenuhnya oleh mahkamah ini) adalah tidak boleh dipercayai, prejudis dan direka oleh tertuduh dan untuk bergantung kepada pengakuan sebegini yang

diberikan oleh seorang yang mengalami kemurangan mental dan delusi adalah tidak adil dan tidak menegakkan keadilan (lihat perenggan 41).

(3) Mahkamah ini juga mengambil kira bahawa anak tersebut yang dapat berjalan dan berkemungkinan telah merangkak atau berjalan ke baldi air dan memanjat ke dalam mangkuk tandas dan telah terjatuh ke dalam baldi air tersebut oleh kerana terdapat keterangan bahawa anak tersebut dapat berjalan dan pernah memanjat mangkuk tandas. Hanya bukti yang tinggal tanpa pengakuan tersebut ialah bahawa tertuduh merupakan orang yang terakhir dilihat bersama anaknya dan fakta sebegini tidak menyimpulkan bahawa tertuduh melakukan pembunuhan (lihat perenggan 42, 44).]

Notes

For cases on s 302, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1131–1132. For cases on confession to murder, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 113.

Cases referred to

Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577 (refd)
Johnson Tan Han Seng v PP [1977] 2 MLJ 66 (refd)
Looi Kow Chau & Anor v Pendakwa Raya [2003] 2 MLJ 65 (refd)
PP v Dato Mokhtar Hashim [1983] 2 MLJ 232 (refd)
PP v Hanif Basree Abd Rahim [2004] 5 AMR 204 (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105 (refd)

Legislation referred to

Criminal Procedure Code s 425
Evidence Act1950 ss 8(1), 17
Penal Code s 302

Juraidah bte Abbas (Mohd Nordin bin Ismai with him) (Johor State Legal Advisors) for the prosecution.
(Freda Sabapathy & Co) for the accused.

Gengadharan Nair JC:

[1] The accused was charged as follows:

> Bahawa kamu pada 16 Januari 2002 jam lebih kurang 5.13 petang hingga 5.23 petang di rumah No 8, Jalan Lembing 15, Taman Putri Wangsa, Ulu Tiram, dalam Daerah Johor Bahru dalan Negeri Johor Darul Takzim, telah melakukan pembunuhan dengan menyebabkan kematian kepada Lye Mei Jing, Sijil Kelahiran No 010306-04-0216 yang berumur 10 bulan dan oleh yang demikian kamu melakukan kesalahan yang boleh dihukum di bawah s 302 Kanun.

[2] The accused claimed trial to the charge.

[3] The prosecution called four witnesses to support their case viz; PWI L/Kpl Mohd Azami ('the photographer'), PW2 Dr Shahidan Mohd Noor (the pathologist),

PW3 Lye Eng Kue ('the father of the deceased and husband of the accused') and PW4 Mohd Nasyrin bin Baharom ('the Investigating Officer'). A

[4] The facts that emerged from the evidence were that on 16 January 2002, PW3 left home for work at Batu Pahat. The wife ('the accused') and the daughter ('the deceased') were at home. On the same day at about 5pm, PW3 received a telephone call from the accused informing him that their daughter was dead and to inform the police so that the police would arrest and hang the accused. B

[5] PW3 when recalled under s 425 of the Criminal Procedure Code ('CPC') further confirmed that the accused had also told PW3 on the phone that the accused had placed the deceased in the water container ('P7') which was in the bathroom. C

[6] When PW3 returned home at about 9pm he found the deceased in the water container. PW3 then carried the deceased out of the water container and laid her on the floor. D

[7] When PW3 asked the accused what happened the accused said repeatedly that the accused wanted to die and wanted the police to hang the accused. PW3 then went to the police station and lodged a report, Ulu Tiram Report 406/02 (P8).

[8] After the investigating officer, PW4, was informed of the police report (P8), he and the police photographer (PW1) went to the scene. Photographs were taken of the scene and the deceased. PW4 was informed by PW3 that the accused was suffering from mental depression. E

[9] PW4 further confirmed that under s 425 of the CPC when PW4 went to the house to investigate, PW4 met the accused who confirmed that the accused had killed her child. This statement was made before the arrest. F

[10] After taking the necessary photographs and after making inquires, the accused was arrested and remanded. Later the accused, on 22 January 2002, gave a cautioned statement (P15) to Inspector Kwek Kea Yap which was admitted in evidence without objection by the defence. In the said cautioned statement, the accused, inter-alia, admits putting the deceased child in the container of water. G

[11] It is the investigating officer (PW4) who took the body of the deceased to the hospital where the post mortem was done by the pathologist, PW2. The deceased on whom the post-mortem was done was identified through photographs by PW2 and PW4. The cause of death was due to drowning as confirmed by PW2. H

[12] In the course of the evidence adduced at the prosecution stage it was evident that the relationship between the deceased and her husband PW3 was good and that both loved their child ('the deceased'). It was also evident that the deceased child was an active child and could walk a few steps. The deceased was seen by PW3 making attempts to climb the cot and also the toilet bowl which was near to the water container (P7). I

[13] In the course of the evidence PW3, the husband of the accused, had testified that the accused suffers from mental depression and has a history of mental illness. She has sought medical treatment at the Psychiatric unit of General Hospital Malacca and Johor Bahru. In 1990, the accused had attempted to commit suicide as she was under mental stress while preparing for her University examinations. In fact two weeks before the incident, ie prior to 16 January 2002, the accused worked in a Kindergarten and left employment on 15 January 2002 after working for 14 days on grounds that the children were naughty, parents were complaining and she was afraid she was not able to teach. She was suffering from depression. She was not sleeping well and taking her medication. PW3 further testified that even the siblings of the accused were under psychiatric treatment at General Hospital, Malacca.

[14] In this case, there was no direct evidence to connect the accused to the crime in question. However, there was sufficient circumstantial evidence viz:

(i) the admission made by the accused to her husband (PW3) that she put the deceased into the water container was accepted by the court under s 17 of the Evidence Act 1950;

(ii) the confession made to police, ie to PW4 before the accused was arrested that the accused had killed the deceased was accepted by the court under s 17 of the Evidence Act 1950;

(iii) The statement in cautioned statement P15 wherein she had admitted killing the deceased was accepted by the court based on the circumstantial principles established in *Public Prosecutor v Dato' Mokhtar Hashim* [1983] 2 MLJ 232 and *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66.

[15] In this case the accused was alone with the deceased who was 10 months old. The deceased was under her care and control. There was no one who could say what happened that day except the accused. Nobody saw the accused put the deceased into the water container. The only evidence at this point of time is the confession that the accused had made to the husband PW3 and to the investigating officer, PW4 and in the cautioned statement. These circumstantial evidence point to only one fact that it was the accused who was in charge of the deceased and had put the deceased in the water container. As a result the deceased died of drowning. The post-mortem report confirms the cause of death.

[16] At the end of the prosecution's case, I was satisfied that the prosecution had established a prima facie case based on the principles enumerated by the Court of Appeal in the case of *Looi Kow Chau & Anor v Public Prosecutor* [2003] 2 MLJ 65 where the Court of Appeal stated (at p 70):

> It is a duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution had made out a prima facie case. He must subject the prosecution evidence to maximum evaluation and ask himself whether he would be prepared to convict the accused on the totality of the evidence contained in the prosecution's case if he were to decide to cal upon the accused to enter his defence and the accused had elected to remain silent. If the answer to that question is in the negative, then no prima facie case would have been made out and the accused would be entitled to an acquittal.

[17] This court then amended the charge as the name of the deceased had been erroneously miss-spelt in the charge and the time when the offence was committed became apparent in the course of the trial.

[18] The accused was allowed to enter her defence to the amended charge which reads as follows:

> Bahawa kamu pada 16 Januari 2002 jam lebih kurang 8 pagi hingga 9 malam di rumah No 8, Jalan Lembing 15, Taman Putra Wangsa, Ulu Tira dalam Daerah Johor Bahru dalam Negeri Johor Darul Takzim telah melakukan pembunuhan dengan rnenyebabkan kematian kepada Lye Mei Jing (sijil kelahiran No 010306-04-0216) yang berumur 10 bulan dan oleh yang demikian kamu telah melakukan kesalahan yang boleh di hukum di bawah s 302 Kanun Keseksaan

[19] The accused claimed trial to the amended charge and went on to give evidence. The accused called her only witness, the psychiatric, Dr Nor Hashim Ahmad to give evidence regarding her mental condition at the time of the incident and thereafter.

[20] The accused in her evidence testified that her daughter's (deceased) death was an accidental death. The accused denied murdering her child. On that day, ie 16 January 2002 the accused and the deceased were at home. The accused had fed her child and bathed her child. At about 4pm, the accused was tired and went to bed together with her daughter. When she woke up at about 5pm she found her daughter missing from bed. The accused searched all over the house. She found her daughter in a water container (P7) which was half closed with its lid. She realized the child was dead and she immediately called her husband, PW3. The accused informed him of what had happened to their daughter. The accused told her husband that the accused wanted the police to arrest her and put her to death. The accused felt guilty that the accused was responsible for the death and therefore should be punished. When her husband returned home on getting her phone call the accused told PW3 that the accused wanted to die and that it was suicidal. The accused felt worthless, better off dead than alive. In the accused's evidence, the accused denied that the accused had put her child into the water container on 16 January 2002.

[21] When the prosecution cross-examined the accused on her admission in the cautioned statement (P15) dated 22 January 2002 that the accused had put the child into the container, the accused replied that she created this story to the police so that she can be hung to death as the accused felt responsible for the accused child's death. The accused blamed herself.

[22] The accused further stated that two weeks before the incident the accused was under mental depression as the accused had to resign from teaching as the accused could not do a good job. The accused admitted that the accused and the siblings were being treated at the General Hospital Malacca Psychiatric Unit and that the accused had been on anti depressant tablets.

[23] Lately, the accused had not been on these tablets because the tablets were old and had passed the expiry period. The accused testified that the accused had told PW4, the investigating officer and the officer who recorded the cautioned statement (P15) that the accused had killed the child but the statement was not true as at that time immediately after the incident the accused blamed herself for the incident and was in a suicidal mood because of her depression as the accused had not been on medication. The accused stated that the accused concocted the story that the accused killed the child so that the police will hang the accused for her child's death.

[24] She further stated in evidence that the deceased child could walk for about 25 feet without any assistance and that the deceased could have walked up to the water container which was by the side of the toilet bowl.

[25] The defence called Dr Nor Hashim (DW2), a psychiatrist at Hospital Permai, Johor Bahru who examined the accused on 25 January 2002. PW2 confirmed that the accused told him that the accused did not know how the child died. DW2 received the accused's medical report and the medical reports of the accused two sisters who were all treated by the Hospital Malacca. DW2 confirmed from the medical records that the accused was treated for depression and was given 'Dothiaprice'. This medicine was later changed to 'fluboxamus' on 7 February 2002. The two sisters of the accused were also suffering from schizophrenia and psychotic disorder.

[26] After observation in the hospital, DW2 concluded that the accused was suffering from psychiatric depression on the day of the incident (16 January 2002). This psychiatric depression is a form of unsoundness of mind which incapacitated her from knowing or recalling or understanding what actually happened. DW2 further testified that on the day of the incident it was possible for the accused to think that the accused was the cause of the death of her child even though the accused was not the cause. DW2 in cross examination by the prosecution said:

> Question:
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> The accused had testified in this court on 27 May 2004 that she is well because she is taking medication.
>
> She now remembers and recalls clearly what happened on 16 January 2002. She testified that her daughter's death was an accidental death. She said the child drowned in a water container when she woke up.
>
> Is it possible for the accused to recall now how her daughter met her death even though it happened when she was of unsound mind?
>
> Answer:
>
> It is possible because human memory depends on emotion to recall. Therefore in this case, it is possible that after the accused's mood becomes better she is capable of recalling the truth of the incident.

[27] Based on the above evidence, this court has to reconsider the issue as to how and the manner in which the deceased had died. Based on the confession made by

the accused to the investigating officer (PW4) in the cautioned statement (P15), it was the accused who had placed the child into the water container.

[28] On the other hand, the accused has now retracted from the confession and said that the accused did not place the child in the water container but made up a story that the accused killed the child because of the accused suicidal tendencies and blamed herself for the killing so that the police can put the accused to death.

[29] The accused is not denying that the confession was made up to the police and in the accused's cautioned statement.

[30] The accused now relies on her mental depression to show that the confession was fabricated and that she did not place the child in the water container.

[31] The psychiatric (DW2) was not called by the prosecution but offered to the defence. This court has no reason to disbelief or reject his evidence. On the totality of the evidence DW2 has presented, it appears that the accused is suffering from psychiatric depression and there is a family history of schizophrenia. The accused was not taking her medication for depression and at the time she was suffering from psychiatric depression and was having suicidal thoughts. In fact, DW2 even testified that in January 2002 the accused's cognitive faculties were impaired and that in January 2002 it was possible for the accused to think that she was the cause for the death of her child even though she was not the cause.

[32] With this evidence, there is no evidence as to who had placed the child in the water container. There is the evidence that the child could walk and climb the toilet bowl. In such factual circumstances, a doubt arises as to whether the child got up from bed when the accused was sleeping, crawled or walked up to the container and tried to climb on top of the toilet bowl and had accidentally fallen into the water container, the stand the defence has taken.

[33] Now the issue this court has to consider is whether the defence has cast a reasonable doubt on the prosecution's case.

[34] In *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577, Federal Court had said (at p 585)

> It needs to be remembered that however weak a defence may be, trial judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which is consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. On the issue of the court's duty to consider the defence, the age old decision in *Mat v PP* [1963] MLJ 263 is still good law today as it was then.

[35] The defence has also raised the motive issue as required under s 8 (1)of the Evidence Act 1950. In this case there is no evidence of any motive for the killing. The accused loved her child. There is no evidence in the post-mortem report that the

A child was bruised. The accused had bathed the child on two occasions on the day of the incident. The child was well nourished.

[36] Since there was no evidence of any motive there is a doubt as to whether the accused in fact had killed the deceased except for her alleged confession.

B

[37] What is the weight to be given to the confession to the police and in her cautioned statement.

[38] In view of the evidence of the DW2 (Dr Nor Hashim) it is highly prejudicial and dangerous to depend solely on the confession made by the accused. It appears C that the accused had contradicted herself when the accused retracted the confession. The accused said the story was concocted at that time because of accused suicidal tendencies so that the accused can be punished for the accused daughter's death. The accused took the blame. The psychiatrist said that it is normal for persons suffering from psychotic depression to create these stories so that the accused can be D hanged for the offence.

[39] Based on the above evidence and the medical report of the accused, this court is of the view that a reasonable doubt has been created as to whether in fact it was the accused who had killed the child or was the death accidental as claimed by the defence.

E

[40] This court is not prepared to convict the accused solely based on the confession (which has been thrown into doubt) when there is evidence that the accused was suffering from psychotic depression and had not been under medication coupled with the evidence from the defence that when the accused confessed it was F not because the accused had killed the child but because by so saying the accused could be hanged and in this way satisfy her suicidal tendencies.

[41] DW2 confirms this theory and is satisfied at that time of the incident the accused was suffering from psychotic depression bordering on unsoundness of mind which incapacitated her from knowing or recalling or understanding what had G actually happened. It is in these circumstances that the confession was made. This court therefore holds that the confession (upon full scrutiny by this court) is unreliable, prejudicial and concocted by the accused and to rely on such a confusion given by a person suffering from mental depression and delusion would be unfair and defeats the ends of justice.

H

[42] This court has to bear in mind and consider whether the child's death was accidental. This court does not discount the possibility that the child who could walk had crawled or walked to the water container and climbed the toilet bowl and had accidentally fallen into the water container as there is evidence that the child can walk and had climbed the toilet bowl before. I

[43] The only evidence in the absence of the confession is that the accused was last seen with the child and this mere fact does not infer that the accused had committed the murder. Other than this fact, there are no other circumstances that show the accused could have killed the child.

[44] In *Public Prosecutor v Hanif Basree Abd Rahim* [2004] 5 AMR 204 Abdull Hamid Embong J (as he then was) said on p 234:

> Mere fact that they were last seen together does not necessarily lead to an irresistable inference that the accused had committed this crime, although that circumstance is an incriminating nature against the accused. There must be other circumstances that may go to show that the accused does not commit this murder.

[45] In this case, there are two sets of circumstances from which inferences can be drawn. One was based on the confession which connects the accused to the crime and the other accused's testimony corroborated by the psychiatrist (DW2) who said that the confession was made during the period when the accused was suffering from psychotic depression and delusion with suicidal tendencies and thereby the confession could be fabricated to ensure that the police could hang the accused.

[46] In *Tai Chai Keh v Public Prosecutor* [1948-1949] MLJ Supp 105 Spencer Wilkinson said (at p 108):

> ... when there is more than one inference which can reasonably be drawn from a set of facts in a criminal case we are of the opinion that the inference most favourable to the accused should be adopted...

[47] The court accepted the accused defence that the accused was in fact suffering from psychotic depression and having suicidal tendencies and the confession was made in these circumstances. In view of the lingering doubts as to whether the death of the child could be accidental this court is left with only one conclusion and that is to give the benefit of the doubt to the accused and acquit the accused of the amended charge. Consequently, I acquitted and discharged the accused.

Accused acquitted and discharged.

Reported by Sally Kee